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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

GEORGE DELANY, *Petitioner*,

v.

MARGARET JESSIE PATTERSON PADGETT, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your petitioner, George Delany, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case January 18, 1952, (petition for rehearing denied March 18, 1952), and as grounds for granting the writ respectfully shows the Court:

Opinions Below

The opinion of the District Court is in the form of a memorandum read to the jury which appears at pages 582-589 of the record, supplemented by a letter citing authorities at pages 597-598 of the record.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 193 Fed. 2d, page 806, and appears in the record at pages 612-622. The order denying rehearing was entered March 18, 1952, without opinion, (page 630 of the record).

Jurisdiction

The judgment of the Court of Appeals was entered January 18, 1952 (Record 612-622). Timely petition for rehearing was filed (R. 625-629), which was denied March 18, 1952 (R. 630). The jurisdiction of this Court is invoked under 28 UNITED STATES CODE, Sections 1254 (1) and 2101 (c). The constitutional question raised is the deprivation of trial by jury as guaranteed by the Seventh Amendment to the Federal Constitution.

Questions Presented

1. In a jury trial of an action at law for land, where the defensive evidence is such that, if believed by the jury, honest and reasonable minds upon the jury would be justified in finding the facts in support of every element of a complete defense, may the U. S. District Judge disbelieve and discard essential portions of the evidence, draw adverse fact inferences when favorable inferences would be reasonable, and from the disputed facts direct a verdict for plaintiffs; and if the judge does so, does he thereby deprive defendant of the right of trial by jury guaranteed by the Seventh Amendment?

Constitution and Laws

The constitutional provision relied on is the Seventh Amendment.

The Rule of Court involved is Rule 38 of the RULES OF CIVIL PROCEDURE, affirming right of trial by jury.

Statement

This was a suit in trespass to try title, purely legal in nature, brought in the U. S. District Court for the Southern District of Texas to recover title and possession of 78.32 acres of land in Galveston County, Texas.

Federal jurisdiction was based upon diversity of citizenship, the amount in controversy being over $3,000.00.

Defendant Delany (Petitioner here) pleaded as a defense the Texas 10-year statute of limitation (REVISED CIVIL STATUTES OF TEXAS, Article 5510), and duly demanded a jury trial (Record page 7) in accordance with Rule 38 of the RULES OF CIVIL PROCEDURE.

Trial was had before a jury. At the conclusion of the evidence the trial court announced his view that judgment should be rendered for plaintiffs (Respondents here) and invited them to make a motion for instructed verdict (R. 571) which was granted (R. 582).

Counsel for Petitioner Delany requested an opportunity to present authorities that the evidence was sufficient on adverse possession, which request was denied, the court saying: "I am sorry. I have fully made up my mind." (R. 578).

Counsel for Petitioner then requested the court to submit the issues to the jury (R. 578-580) in line with the suggestion made in FRATTA v. GRACE LINE, 139 Fed. 2d 743, at 744, which request was denied.

The evidence showed that Petitioner Delany took possession of the land in controversy in March or April, 1938, and continued in possession right up to the time of trial. This suit was filed July 29, 1949, more than eleven years after Delany's entry.

72.68 acres of the land sued for is within the Delany pasture. (The remaining 5.64 acres is outside his enclosure and hence not really in controversy. It may be disregarded).

The Delany pasture forms a triangle with a west fence about 9,000 feet long, a south fence about 9,000 feet long, and a northeast fence completing the triangle about 13,000 feet long.

In March-April, 1938, more than 11 years before this suit was filed, George Delany openly invaded the area. To use his own words: "I took it." (R. 505).

Prior to 1938 the land was open and unenclosed. There had been, in years gone by, a fence along the Interurban-right-of-way which bounded the pasture on the northeast, but that fence had been abandoned some years before, had gradually been destroyed, and had ceased to exist as a fence. Mrs. Delany testified (R. 565): "There really wasn't a fence."

Mr. Delany testified (R. 554) that at that time there were hardly any cedar posts because they had been burned down by prairie fires and many fence posts made of concrete had been broken. The wire was down and for hundreds of feet at a stretch there was no fence at all. The old wire that was down was not worth tying together. There was nothing to hold stock.

Along came Delany in 1938 and built a new fence along the line where the vestiges of the old fence remained. He testified (R. 55) that he put in approximately 600 posts and 3 strands of new wire from end to end. This was a distance of over 13,000 feet. The 600 fence posts which Delany used in building the northeast fence amounted to 75% of the total number of fence posts in the entire fence (R. 555-556). 100% of the wire was new. This fence actually cuts through the land in suit for a distance of 997 feet. It was placed there by Delany for the purpose of exercising dominion and control over the land in suit adversely to Respondents.

Along the south of the pasture Johnny Palmer was putting in a fence suitable only for marking a survey line but not suitable for holding cattle. Palmer was doing this for Maco Stewart. The posts were 30 feet apart with only 2 strands of wire high on the posts. (R. 485-486). "A cattle man doesn't call that a fence." (R. 563).

The triangular pasture contains a number of specific tracts, some of which were owned by Maco Stewart, and some of which belonged to Mr. Pabst, Mr. Alberts and Mr. Forman, who were clients of Maco Stewart (R. 513).

Delany made an oral arrangement with Maco Stewart by which Mr. Stewart gave control of this south fence to Delany, and Delany was thereby placed in privity with it. In exchange for the partial fence, Delany agreed with Mr. Stewart that Delany would take care of Stewart's holding in the pasture (R. 505-506), including the Pabst, Alberts and Forman holdings (R. 513). No agreement was ever made with any one at any time with respect to the tract in controversy. Except for the tracts belonging to Stewart, Alberts, Pabst and Forman, Delany claimed for himself as his own the remainder of the pasture, including that part of the land in suit which is within Delany's fence (R. 506-507).

Delany testified in Court:

Q. With the exception of land owned by Mr. Stewart and his clients, when he gave you that south fence, state whether or not you have claimed the remainder of the pasture as yours.
A. I have.
Q. Since what date?
A. Since we went in.
Q. To restrict the matter to this law suit, Mr. Delany, I will ask you to look at either the map prepared by Mr. Boyle—I will ask you to look at that one

and also the map prepared by Mr. Washington, both of which locates the ground sued for in the same spot—and ask you whether or not you have claimed that particular pasture in the area as your own since 1938.

A. Yes, I have claimed that."

Delany proceeded to convert the line-marker fence into a cattle-proof fence, contributed 400 posts to the building of it, which 400 posts constituted 65% of the total number of posts (R. 555-556). Delany ran two new strands of wire the entire length of this south fence (R. 555, 486, 563), and thereby converted it from a line-marker fence into a substantial cattle-proof fence (R. 565-487). All this was in addition to Delany's acts in connecting such newly constructed fences with the existing fence to the west of the Palmer Road, which completed the enclosure (R. 488-490). To complete the enclosure, Delany put a wire (gate or "wire gap" as it is called) across the Palmer Road at the south end, and another at the north end to keep his cattle in (R. 488-490). Delany requested the County Commissioner to put in cattle guards in place of the wire gates, which was done (R. 492-493). Delany extended the fences west to connect with the existing west fence, which ran about 100 feet west of and parallel with the road (R. 488-498-490). He later (1940) built a brand-new fence along the east side of the Palmer Road (R. 493). These fences were built by Delany to exercise dominion and control over the enclosed lands.

From March-April, 1938 to the time of trial, Delany maintained his fences well and kept them in condition to retain cattle (R. 565).

From March-April 1938 to the time of trial Delany kept his pasture stocked with from 150 to 200 head of

cattle and horses, sometimes more (R. 502). In exchange for help in building fences and working the cattle, Delany permitted Ike Franks and Willie Bird to place cattle in his pasture, subject to Delany's control (R. 495, 456, 419).

Delany actually, openly and visibly kept full possession of every part of his pasture, grazing cattle therein, fertilizing and improving it with superphosphate (R. 500, 550, 566), disked it (R. 550), planted clover, lespedeza and Dallas grass (R. 500), made hay on it personally and with his family, and also by granting hay rights to others who made hay on shares, paying to Delany a royalty of so many bales to the ton (Lambden, R. 398-399; Corrigan, 403; Hines, 439; Pizzitola, 453-454; Hayes, 474-575; 497-498, 552). This haymaking activity commenced in 1938 and continued from year to year, and covered all the country in the pasture (R. 552), which, of course, included all of the tract in suit, except the small corner outside the fence.

Delany mowed the land for weed-control, cut a 10-foot lane as a fire-guard clear around the pasture, to keep fire from burning his fence, and put in water wells and windmills to water stock (R. 500-501), and water troughs (R. 505).

He excluded trespassers and intruders, including Phelps who came to remove soil (R. 503), Mr. Boyles' engineers, who came to survey (R. 503), a seismograph crew (R. 503), hunters with .22 rifles (R. 504), and others.

The open, notorious and hostile character of Delany's possession and claim is further evidenced by the fact that a number of parties owning different tracts in the Delany pasture found it necessary to file suit against Delany, such as HAMMONS v. DELANY (R. 512), LYMAN WILSON v.

DELANY (R. 511), and that various other parties (Lobit R. 510, A. A. Horne, R. 511-512) either filed their law suits or compromised with Delany without going to court.

Specification of Errors to be Urged

The Court of Appeals erred in overruling Petitioner's Grounds for Rehearing, quoted below from his petition for rehearing:

1.

"Appellant Delany made out a case for the jury on the issue of ten years adverse possession under the Texas statute, and this Court's affirmance of the trial court's action in taking the case from the jury deprives Appellant of his right to jury trial guaranteed by the Seventh Amendment of the United States Constitution.

2.

"In view of the established law of Texas to the effect that an adverse claimant may recognize the title to one tract of land and make adverse claim to other tracts in the same enclosure, this Honorable Court's holding, that Appellant's recognition of the title of Maco Stewart and certain of his clients (Pabst, Forman, Alberts) to certain other tracts precludes Appellant from claiming the Padgett tract adversely to Appellees, is contrary to Texas property law, the evidence showing that Appellant did claim the land in controversy as his own and did not recognize Appellee's title.

3.

"In view of Appellant's affirmative evidence that, for all practical purposes, Delany built a new fence on the northeast of the pasture along the line where an old abandoned

fence had once existed (but which had been almost entirely destroyed), Delany putting in 600 new posts (75% of the total) and all new wire (3 complete strands for over 13,000 feet); and that Delany put in 400 new posts (65% of the total) and two complete strands of new barbed wire along the entire length of the south fence, converting Maco Stewart's "line-marking fence" that would not hold cattle into a cattle-proof fence (Delany being in privity with Maco Stewart as to this south fence), upon completion of which the pasture was completely enclosed, a jury issue was presented; and this Court's holding that Delany effected the enclosure by a mere "casual joining" of "existing fences" deprives Appellant of his right to have such fact issue, upon which a jury might have reasonably found in his favor, submitted to the jury.

4.

"Appellant Delany's acts in the building and rebuilding of fences, his open, continuous, hostile and notorious possession and use of the tract in controversy, claiming it as his own adversely to the Appellees, using it for cattle-grazing, hay-making and the other acts shown by the evidence, for over 11 years, were amply sufficient to raise a fact issue for the jury as to whether such facts were reasonably sufficient to put the owners on notice of Delany's adverse and hostile claim, the law of Texas not requiring actual notice to be brought home to an absentee owner and not requiring such proof beyond a reasonable doubt.

5.

"This Honorable Court's holding that Appellant's office as justice of the peace, respected standing in the community for integrity and upright dealing, and neighborly dealings with the Stewarts, is *legally incompatible* with his un-

neighborly intent of claiming adversely the land in controversy, unlawfully deprives Appellant of the benefits of the Texas 10-year Statute of Limitations, by holding, in effect, that he was incapable of having the intent to claim by limitations, which question of Delany's intention was a fact issue for the jury.

6.

"This Honorable Court erred in overruling the Fourth Point of Appellant's Specification of Errors reading as follows:

> 'The trial court erred in holding that the evidence offered by the defendant was insufficient to create a fact question for the jury as to whether the defendant had acquired title under the ten-year statute of limitations and in instructing a verdict for the plaintiffs.' "

Reasons For Granting The Writ

This case involves a basic and far-reaching departure from the accepted and usual course of judicial proceedings, and the Court of Appeals has so far sanctioned such a departure by the lower court as to call for exercise of the Supreme Court's power of supervision (Supreme Court Rule 38-5-b).

To put it bluntly: —the trial judge assumed to act as a one-man jury, passing upon the credibility of the witnesses, disbelieving and rejecting such evidence as he chose, placing such construction and drawing such adverse inferences from the testimony as he might have done had he been on the jury.

The members of the jury were reduced to a mere court-room audience. There were substantial issues of fact for them to pass on, but they were not permitted to perform their constitutional function.

To be specific:

At page 507 of the record, counsel showed Petitioner Delany the maps in evidence which indicated the location of the tract sued for, and asked him:

> "Q. To restrict the matter to this law suit, Mr. Delany, I will ask you to look at the map prepared by Mr. Boyle—I will ask you to look at that one and also the map prepared by Mr. Washington, *both of which locate the land sued for in the same spot*—and ask you whether or not you have claimed that particular area in the pasture as your own since 1938?
> A. Yes. I have claimed that."

In the face of such evidence the trial court found (R. 589):

> "I was a little surprised and puzzled to note that the defendant never did in his testimony before the court come straight out and say he was claiming the particular land involved in this suit. As far as he would go was that he was claiming the land involved and included in his pasture."

Moreover, even without express testimony by the adverse claimant saying "I claimed it", the possession and use of the land in compliance with the terms of the limitation statute carries with it the logical inference that claimant's possession was hostile and under a claim of right. THOMPSON v. RICHARDSON (Tex. Com. App.), 221 S.W. 952, affirming 186 S.W. 275. In other words, actions speak louder than words, and the jury would have been justified in concluding from Delany's conduct alone that he did claim the land as his own.

Further:

The trial court, in peremptorily instructing a verdict against Petitioner Delany, delivered his findings as to the fences, excerpts from which follow (R. 586, 587, 588):

"Another picture is that over to the east, along what defendant claims became the east boundary of his pasture, there was an interurban railroad right of way fence. *I assume* it is like the various railroads and interurban lines, that their rights of way are fenced, and there was a right of way fence there, *perhaps* in various stages of repair. *That may be a matter of some dispute.* But the fence that was there and which the defendant says he took over had not been put there in connection with any boundary line or in connection with anything involved in this suit, and not in connection with any parties to this suit. * * *

"So neither the fence on the west side of the Johnny Palmer Road nor the interurban right of way fence ever had anything in the world to do with the land involved in this suit. * * * So the picture we have on the east side and the west side is that the fences had no earthly connection with anything involving the plaintiffs' land.

"Now, down on the south boundary the defendant also finds a fence. He *minimizes* the condition of it and the use that could be made of it, but it was there, and was not put there by the defendant or by any person who was undertaking to claim plaintiffs' land. * * * None of those fences were there for the purpose of trying to take from the plaintiffs by limitation title their 80 acres of land."

* * *

"Now he says that the reason he did that, what he did, was to save expense. *It might be assumed* that he

did it in this way, *in order not to put the plaintiffs on notice* that he was claiming the tract of land."

* * *

"Of course the evidence shows that later on he built a fence of his own on the east side of the Johnny Palmer Road and has more ground after he built that fence to contend he had an enclosure that would put plaintiffs on notice and would cause the statute to run against them than he had before."

These adverse findings and conclusions arrived at by the trial court bear upon the issue of visible appropriation or notice. The standard requirement on this point is stated in W. T. CARTER & BRO. v. RICHARDSON, 225 S.W. 817 (affirmed 236 S.W. 978) as follows:

"It has been frequently said, substantially, by the appellate courts of this State, that an owner of land is bound to take notice of an actual possession thereof by another; that such owner is charged by law with the knowledge of his boundaries, and that whatever is reasonably sufficient to notify such owner that another is setting up claim to his land, which is hostile to and inconsistent with the true ownership, then the statute of limitation is put in operation from that moment."

The Texas Commission of Appeals, affirming the case just cited, quoted the old and shrewd remark that:

"He (the owner)is not in the condition of an ordinary and casual observer, but must diligently look to his own interests, know the boundaries of his own land, and ascertain the extent, meaning and locality of any settlement made within them without his authority." (236 S.W. at 979).

Indeed, there is no technical requirement of the law that the adverse claimant build fences; the matter of fencing becomes important as an evidentiary circumstance on the issue of notice, which is, of course, a fact issue. The case of PEVETO v. HERRING, 198 S.W. 2d 921, makes it clear:

> "The fact that fences belonging to other persons, which were erected to enclose other land, were used as a part of the enclosure along the south and perhaps along the west boundaries of the land was at most only a circumstance bearing upon the character of notice given by appellants' use of the land, and did not prove, as a matter of law, that appellants' possession was insufficient to convey notice of appellants' adverse claim or that said possession was not exclusive." (198 S.W. 2d at pg. 927).

It is, of course, immaterial whether the record owner actually knows of the adverse possession or not, or whether he lives next door to the adverse claimant or 1,000 miles away. The rights of an absentee owner are neither greater nor less than those of an owner living in the neighborhood.

Thus the adverse fact findings made by the trial court went far beyond the proper scope of his function as a judge.

The quoted findings show that the trial court:

1. Affirmatively disbelieved and rejected the evidence of Mr. and Mrs. Delany that the old abandoned interurban right-of-way fence had disintegrated and ceased to exist as a fence prior to Delany's entry in 1938. The jury might properly (we feel they would) have believed this evidence.

2. The trial court disbelieved and rejected the evidence of Mr. and Mrs. Delany that Delany built a new fence along the right-of-way line upon the vestiges of the fence

that had once been there, Delany putting in 600 new posts (75% of the total) and three complete strands of new barbed wire along the entire 13,000-foot distance. Delany built 997 feet of this fence across the land in suit. The jury might properly have believed this evidence and concluded that it was reasonably sufficient to put Respondents on notice of Delany's adverse claim.

3. The trial court disbelieved and rejected Delany's evidence that he acquired control of the Maco Stewart "line-marker" fence under his arrangement with Mr. Stewart, and that he (Delany) erected 400 new posts (65% of the total) and strung 2 complete strands of new barbed wire the entire distance of the south line (over 9,000 feet), thereby creating for the first time a cattle-proof fence. The jury might properly have believed this evidence and might properly have concluded that it was sufficient to constitute reasonable notice of Delany's adverse claim.

4. The trial court's conclusion that none of the fences were there for the purpose of trying to take from the plaintiffs by limitation title their 80 acres of land invades the jury's fact-finding province; for, if Delany is to be believed, that was indeed his purpose, and the jury may have so found.

5. The trial court's assumption, as a matter of fact, that Delany used what building material was already there in building his fences was "in order *not* to put the plaintiffs on notice that he was claiming the tract of land" is a fact inference on which the jury might properly have found to the contrary. The jury might properly have concluded that Delany's overt acts were sufficiently bold, open and notorious to give reasonable notice to the world of his intentions in the matter.

6. The Court of Appeals, in a beautifully written opinion, sanctions the trial court's departure from the usual course of proceedings, commenting as if it were an undisputed fact that all that Delany did was "to merely run connecting lines between two or more existing fences" (R. 618), and referring (R. 620) to "the casual kind of fencing" and to "the casual joining of fences and the mere pasturing of cattle within the enclosure thus conveniently formed."

The trial court indulged a couple of other subsidiary findings, for instance, to the effect that the defensive pleadings did not describe and claim except to land within the pasture. The evidence admitted without objection (R. 553) fully identifies the portion of the tract inside the fence claimed by Delany and that part outside the fence not claimed by him. Under Rules 12h and 15b of the FEDERAL RULES OF CIVIL PROCEDURE, Plaintiffs' failure to object was a waiver of any complaint they may have made. There was ample evidence for the jury to find what part was inside the fence.

The trial judge further suggested that there was such "a small portion" of the tract that was not surrounded by circumscribing tracts, that he was of opinion that the tract was "so nearly entirely surrounded" as to bring another statute into play (Art. 5511). Delany's testimony at page 553 of the record, considered in connection with the map (Defendant's Original Exhibit No. 10 which is with the Clerk of the Court of Appeals), constituted evidence that the fence cut through the tract a distance of 997 feet which raised at least a jury issue that it was not entirely surrounded" by circumscribing tracts.

The Court of Appeals drew an additional adverse fact

inference of its own, inferring that, since Delany was a respected member of his community and had made a neighborly agreement with Maco Stewart to protect Maco Stewart's holdings, Delany did not have the "unneighborly intent" of taking the Padgett land away from Respondents, which was a disputed fact issue for the jury.

What Delany's intention was constituted a fact issue for the jury.

The Court of Appeals infers that, somehow, Delany's recognition of Maco Stewart's title was in fact an acknowledgment of Respondents' title.

The settled rule in Texas is that an adverse claimant need not "claim all or none". As said in VERGARA v. MYERS, 239 S.W. 942:

> "The person claiming adversely can, we think, recognize the title to one tract of land by leasing it and repudiate the title to the other tracts."

The Delany-Stewart agreement was not for Respondents' benefit. It still left Delany's claim to the Padgett land a fact issue for the jury.

See the Texas cases cited in the footnote.[1]

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[1] Taliaferro v. Butler, 77 Tex. 578, 14 S.W. 191;
Parker v. Newberry, 83 Tex. 428, 18 S.W. 815;
Burnham v. Hardy Oil Co., 147 S.W. 330, aff. 108 Tex. 555, 195 S.W. 1139;
Church v. Waggoner, 78 Tex. 203, 14 S.W. 581;
League v. Buena Ventura Stock Co., 21 S.W. 307;
Brown v. O'Brien, 33 S.W. 267;
Carter v. Webb, 239 S.W. 630;
Loring v. Jackson, 95 S.W. 19, err. ref.;
Wingfield v. Smith, 241 S.W. 531, err. ref.;
Huling v. Moore, 194 S.W. 188, err. ref.

MEADERS v. MOORE, 134 Tex. 127, 132 S.W. 2d 256, makes it clear that even where the adverse claimant has "bought his peace" by purchasing undivided interests from some of his adversary's co-heirs, that does not constitute recognition as a matter of law, but merely raises a fact issue for the jury. Recognition that A owns Blackacre does not constitute recognition that B owns Whiteacre. It is a question of fact.

In order that the Court may have before it in convenient form the pertinent provisions of the Texas limitation statutes, we set forth excerpts from the REVISED CIVIL STATUTES OF TEXAS:

> *Article 5510:* "Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward * * * "

The statutory definitions are:

> *Article 5514:* " 'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate."
>
> *Article 5515:* " 'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

The vice inherent in the peremptory instruction for verdict in this case is that the trial judge took it upon himself to exercise a power which the Seventh Amendment vests in another tribunal—the jury.

This petition does not inveigh against the directed verdict as a legitimate and useful tool in a proper case. Where there is nothing for the jury to decide, the trial court properly takes the case from them.

By the same token, where there is something for the jury to decide, the jury alone have the constitutional power to make the decision.

By "something to decide" we mean essential fact issues, based upon substantial evidence, which honest and reasonable minds may decide one way or the other.

The trial judge's function in such cases is to furnish disinterested and competent guidance, leaving to the jurors the performance of the duty expected of them by the Seventh Amendment.

The issues in a limitation case are essentially fact issues. The adverse possessor's hostile intent to appropriate the land for himself is a question of fact to be found from his words and conduct.

The issue of whether the adverse possessor's conduct has been sufficiently visible and open as to give reasonable notice of his adverse claim is comparable to the issue of negligence in tort cases. That too is basically a fact issue.

There was substantial evidence in support of every element required by the statute.

The evidence raised the issue that Delany's possession was continuous and peaceable and not interrupted by adverse suit within the 10-year period.

There was evidence raising the issue that he used it or enjoyed it.

There was evidence that his possession was actual and exclusive.

There was evidence that his appropriation of the land was "visible", that is, open, notorious and characterized by such

overt conduct as to be reasonably sufficient to notify the owner that he was setting up claim to the land.

There was evidence that Delany, from 1938 to 1949, openly exercised such rights to the land as only an owner is entitled to exercise, and that such claim of right was inconsistent with and hostile to the claim of anyone else.

The claim of right mentioned in Article 5515 does not have a technical meaning. The Texas cases establish that:

> "Under the ten years' statute, no deed is necessary; no muniment of title is required; and the possession in compliance with the terms of the statute, in the absence of evidence to the contrary, carries with it the presumption that it is held under a claim to the land. However, where the evidence raises the issue as to the assertion of a claim of which the possession is notice, it then becomes a jury question." THOMPSON v. RICHARDSON, 221 S.W. 952, Commission of Appeals opinion adopted by Supreme Court of Texas.

During all the 11-year period from April, 1938 to July, 1949, Respondents never questioned Delany's right to the land, and Delany never said or did anything to indicate that he was not claiming this 72.68 acres as his own against the world.

To the contrary, Delany physically invaded the land by building a fence which crossed the tract for a distance of 997 feet, fencing out 5.64 acres and fencing in 72.68 acres.

Anyone who has ever had anything to do with building a barbed wire fence knows that it is an act which is visible and overt. The activities of the fencing crew in open daylight can be neither furtive nor surreptitious. The product of their labor is likewise visible.

For Delany and his fence crew to set 600 posts in the northeast fence and 400 posts in the south fence, stringing 39,000 feet of barbed wire on one set of posts and over 18,000 feet of wire on the other set, was certainly open and visible conduct.

When haymakers sought to make hay, they came to Delany (commencing in 1938) and he granted hay rights for a royalty of so many bales to the ton. The activities of a hay-making crew on the 72.68 acre tract were necessarily overt conduct. Delany's conduct in the matter was conduct which only an owner would be entitled to exercise, and certainly should have operated as visible notice to all the world of his claim, inconsistent with and hostile to the claims of Respondents.

The same is true of Delany's cattle-grazing activities, the disking and fertilizing of the land, and the other activities shown by the evidence.

Only by exercising jury prerogatives could the trial judge decide these fact issues against Delany.

W. T. CARTER AND BRO. v. RICHARDSON, 225 S.W. 817, affirmed 236 S.W. 978, cited and quoted at page 13 of this petition, must make it clear that the jury could, if the judge had been willing to give them the opportunity under competent and disinterested guidance, have decided the fact issues in Delany's favor.

The jury could have so decided, honestly and reasonably, with full support in the evidence before them.

The role played by the trial judge appears to us to be aggravated by the fact that, in effect, he granted the motion for instructed verdict before the motion was made. He invited Respondents to make the motion (R. 571):

> "THE COURT: You make such motion?
> MR. LEVY: We make such motion."

When Petitioner's counsel excepted to the motion as not stating specific grounds, Respondents' counsel contented himself with the broad statement "that there is no evidence of probative value as to the limitation or possession claim on the part of the defendant." (R. 581).

It is obvious that the trial judge took the lead in deciding the facts for himself rather than let them go to the jury. The manner of handling it emphasizes the importance of submitting the facts to the jury for decision.

The Supreme Court case of GALLOWAY v. UNITED STATES (1942), 319 U.S. 372, 87 L. ed. 1458, makes it clear that the guaranty of the Seventh Amendment requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them.

The majority opinion in that case and the dissenting opinion discuss and review the history and legal basis of the directed verdict, and its status in the Federal judicial system under the Seventh Amendment.

Whether "substantial evidence" or "some evidence" or "any evidence" be the usual and accepted formula for testing the presence of a jury question, that case drew the line between permitting "mere speculation to do duty for probative facts", and permitting the jury to draw reasonable inferences favoring the party whose case is attacked.

That rule was applied by the Supreme Court in 1948 in WILKERSON v. MCCARTHY, 336 U.S. 53, 93 L. ed. 497, to require the jury to determine whether the facts in that case measured up to what "a reasonable and prudent person would have done under the same circumstances".

The basic fact issue in the case at bar, based upon an abundance of substantial evidence, is whether Delany's con-

duct was reasonably sufficient to give notice of his adverse claim to the land.

We submit that it is so obvious that there were *real* fact issues in the case, that the basic law question for the Supreme Court's decision is not so much: "Were there real fact issues for the jury?" but rather:

"In the Federal judicial system, where there are real fact issues, is the submission of the case to the jury a matter of grace to be withheld at the judge's discretion? Or is it a matter of constitutional right?"

Stated otherwise:

"Has the determination of real, basic fact issues by judges in jury cases became an accepted and usual part of the course of Federal judicial proceedings? Or is it such a deprivation of constitutional right as to call for the exercise of the Supreme Court's supervisory power?"

It is not the mere outcome of this case that is at stake. It is the malignant tendency to repeat the invasion of the jury's field (that threatens to become, indeed, an accepted and usual practice in trial courts, both State and Federal, that requires restraint within constitutional limits.

The right of trial by jury afforded by the Seventh Amendment is not of less importance than the right of jury trial afforded by the Federal Employers' Liability Act.

We subscribe to the statement of the district judge in TARTER v. U. S., 17 Fed. Supp. 691, 692, as to the minimum meaning of the Seventh Amendment:

> " 'The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testi-

> mony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.' "

It is submitted that this Court should grant certiorari to settle the question of the extent to which Federal trial courts can invade the jury's province without running afoul of the Seventh Amendment.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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The evidence of adverse possession appears in the printed Transcript of Record between pages 312 and 570. The remainder of the Transcript is devoted to evidence on the question of legal title, which question was before the Court of Appeals but is not involved in this Petition.